Khalid bin Abdul Samad v Dato' Dr Hasan bin Hj Mohamed Ali

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO B-02(NCVC)(W)-155–01 OF 2014
ALIZATUL KHAIR OSMAN KHAIRUDDIN, TENGKU MAIMUN ANDABANG ISKANDAR JJCA
5 AUGUST 2016

Tort — Defamation — Defamatory statements — Respondent commenced action for defamation against appellant — High Court allowed claim and appellant appealed — Whether statements defamatory — Whether there was malice on part of appellant — Defences — Whether defences of qualified privilege and fair comment applicable — Damages — Whether respondent entitled to general damages and aggravated damages

The respondent was a member of Parti Islam SeMalaysia ('PAS') and after being dismissed from PAS, he had formed a non-governmental organisation ('NGO') called Jalur Tiga ('JATI'). The appellant was at the material time a Member of Parliament for Shah Alam, Selangor and also a member of PAS. The respondent had commenced an action for defamation against the appellant which allegedly committed by the appellant in a press conference held on 24 February 2012. The defamatory statements ('P1') were then published by the appellant in his blog in the form of a video clip and article entitled 'Video: Siapa Taja Hasan Ali'. The statements were in relation to the source of fund for the respondent to launch JATI which cost about RM30,000. The respondent found the statements to be defamatory of his character and reputation and the statements were published with malice. The defences that were sought by the appellant were the defences of qualified privilege and fair comment. The learned High Court judge allowed the respondent's claim and ordered the appellant to pay RM200,000 as general damages and a further RM100,000 as aggravated damages with interest and costs, hence this appeal. The major issues for court's determination were: (a) whether the statement made was defamatory; (b) whether the defence of qualified privilege was applicable; (c) whether the appellant was protected by the defence of fair comment; (d) whether there was malice on the part of the appellant; and (e) on the issue of damages.

Held, allowing the appeal in part:

(1) Based on the statements, the respondent's reputation had been tarnished and his reputation lowered in the eyes of reasonable members of society. The statements in P1 were clearly in their natural and ordinary meaning

defamatory of the respondent. Thus, the court agreed with the learned trial judge that the appellant had defamed the respondent when he published the impugned statements during the press conference and then in his blog (see paras 15 & 17). A

(2) The appellant had failed to show to the court that he was a member of JATI and thus, he had no business to be concerned with the affairs of JATI vis a vis the respondent. Not being a member of JATI, the appellant had no duty to communicate his concerns on the financial contributors of JATI to the public at large by publishing his statements in his blog. Clearly, there was no nexus between the appellant and JATI that might have given rise to such a duty to the appellant. As such, the appellant could not avail himself of the defence of qualified privilege in this defamation suit brought against him (see para 21). B C

(3) A defendant vying to avail himself of the defence of fair comment has to plead such a defence as required by the applicable rules of procedure. Based on the evidence in relation with P1, the pleaded defence failed to exhibit which of the words therein were facts and which were comments. Such blatant non-compliance of O 78 r 3(2) of the Rules of the High Court 1980 had rendered the defence of fair comment unsustainable. Further, the 'comments' made by the appellant were neither fair nor accurate. As the appellant had failed to particularise which of the words in P1 were his comments, it would be impossible to even venture a guess. In the circumstances of this case, it was a non-starter (see paras 26–28). D E

(4) The court agreed with the finding of the learned trial judge that there was ample evidence led by the respondent from which malice could be readily inferred. Further, since the respondent had pleaded in his statement of claim that the appellant had been malicious in defaming him, there was no need for the respondent to have state in his reply to the statement of defence that the appellant had been malicious. Based on the evidence, the trial court judge's findings were supported by cogent evidence coupled with sound application of the relevant legal principles. Thus, the court affirmed the trial judge's conclusion on liability *in toto* (see paras 31, 34 & 36). F G H

(5) Damages ought to flow once liability for defamation was established. In this case, the court affirmed the award entered against the appellant for general damages as there was no evidence led by the appellant to show that the respondent had only a 'little residue credit' although he was sacked by PAS. The court allowed the appellant's appeal against the award for aggravated damages as the respondent had failed to prove circumstances that would justify an award of such damages against the appellant (see para 38). I

[Bahasa Malaysia summary

Responden merupakan ahli Parti Islam SeMalaysia ('PAS') dan selepas dibuang dari PAS, beliau telah membentuk organisasi bukan kerajaan ('OBK') yang dipanggil Jalur Tiga ('JATI'). Perayu telah pada setiap masa matan seorang Ahli Parlimen bai Shah Alam, Selangor dan juga seorang ahli PAS. Responden telah memulakan tindakan untuk fitnah terhadap perayu yang dikatakan telah dilakukan oleh perayu dalam siding akhbar yang diadakan pada 24 Februari 2012. Kenyataan berunsur fitnah ('P1') yang kemudian diterbitkan oleh perayu dalam blognya dalam bentuk klip video dan artikel bertajuk 'Video: Siapa Taja Hasan Ali'. Kenyataan-kenyataan berkaitan sumber dana untuk responden melancarkan JATI yang bernilai lebih kurang RM30,000. Responden mendapati kenyataan-kenyataan itu berunsur fitnah terhadap karakter dan reputasinya dan kenyataan-kenyataan tersebut telah diterbitkan dengan niat jahat. Pembelaan-pembelaan yang dipohon oleh perayu merupakan pembelaan-pembelaan perlindungan bersyarat dank omen yang adil. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan tuntutan responden dan memerintahkan perayu untuk membayar RM200,000 sebagai ganti rugi am dan selanjutnya RM100,000 sebagai ganti rugi teruk bersama faedah dan kos, justeru rayuan ini. Isu-isu utama untuk ditentukan mahkamah adalah: (a) sama ada kenyataan yang dibuat berunsur fitnah; (b) sama ada pembelaan perlindungan bersyarat terpakai; (c) sama ada perayu dilindungi oleh pembelaan komen yang adil; (d) sama ada terdapat niat jahat di pihak perayu; dan (e) berhubung isu ganti rugi.

Diputuskan, membenarkan sebahagian daripada rayuan:

(1) Berdasarkan kenyataan-kenyataan tersebut, reputasi responden-responden telah terjejas dan reputasinya direndahkan di mata ahli-ahli persatuan yang munasabah. Kenyataan-kenyataan dalam P1 jelas dalam maksud semula dan biasa berunsur fitnah terhadap responden. Oleh itu, mahkamah bersetuju dengan hakim perbicaraan yang bijaksana bahawa perayu telah memfitnah responden apabila dia menerbitkan kenyataan-kenyataan yang dipersoalkan semasa sidang akhbar itu dan kemudian dalam blognya (lihat perenggan 15 & 17).

(2) Perayu telah gagal menunjukkan kepada mahkamah bahawa dia seorang ahli JATI dan oleh itu, dia tiada hal untuk perlu mengambil berat tentang urusan JATI melalui responden. Bukan ahli kepada JATI, perayu tiada kewajipan untuk menyampaikan kebimbangannya tentang penyumbang kewangan JATI kepada awam keseluruhannya dengan menerbitkan kenyataan-kenyataannya dalam blognya. Jelas, tiada kaitan antara perayu dan JATI yang mungkin telah mewujudkan kewajipan sedemikian kepada perayu. Oleh itu, perayu tidak dapat membela dirinya dengan pembelaan perlindungan bersyarat dalam guaman fitnah ini yang dimulakan terhadapnya (lihat perenggan 21).

(3) Defendan bersaing untuk membela dirinya dengan pembelaan komen yang adil perlu mempli pembelaan sebegini sepertimana dikehendaki oleh kaedah prosedur yang terpakai. Berdasarkan keterangan berkenaan P1, pembelaan yang dipli telah gagal untuk mengekshibitkan kata-kata mana merupakan fakta dan yang mana komen. Ketidakpatuhan jelas A 78 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 telah menjadikan pembelaan untuk komen yang adil tidak dapat dikekalkan. Selanjutnya, 'comments' yang dibuat oleh perayu tidak adil atau tepat. Oleh kerana perayu telah gagal untuk memperincikan kata-kata mana dalam P1 merupakan komennya, ia adalah mustahil untuk membuat tekaan. Dalam keadaan kes ini, ia bukan suatu permulaan (lihat perenggan 26–28).

(4) Mahkamah bersetuju dengan penemuan hakim perbicaraan yang bijaksana bahawa keterangan mencukupi yang dikemukakan oleh responden daripada mana niat jahat boleh dengan mudah disimpulkan. Selanjutnya, oleh kerana responden telah mempli dalam penyataan tuntutannya bahawa perayu telah dengan niat jahat memfitnahnya, maka tidak terdapat keperluan untuk responden menyatakan dalam jawapannya kepada penyataan pembelaan bahawa perayu telah berniat jahat. Berdasarkan keterangan, dapatan hakim mahkamah perbicaraan telah disokong dengan keterangan yang meyakinkan bersama dengan pemakaian kukuh prinsip-prinsip perundangan yang relevan. Oleh itu, mahkamah mengesahkan kesimpulan hakim perbicaraan berhubung liabiliti di *toto* (lihat perenggan 31, 34 & 36).

(5) Ganti rugi patut diberikan selepas liabiliti untuk fitnah dibuktikan. Dalam kes ini, mahkamah mengesahkan award yang dimasukkan terhadap perayu untuk ganti rugi am kerana tidak terdapat keterangan yang dikemukakan oleh perayu untuk menunjukkan bahawa responden hanya mempunyai 'little residue credit' meskipun dia telah disingkirkan oleh PAS. Mahkamah membenarkan rayuan perayu terhadap award untuk ganti rugi teruk kerana responden telah gagal membuktikan keadaan yang mewajarkan award untuk ganti rugi sedemikian terhadap perayu (lihat perenggan 38).]

Notes

For cases on defamatory statements, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 434–455.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1, PC (refd)

A *Lee Ah Seng & Anor v PP* [2007] 6 MLJ 1, FC (refd)
Lee v Ritchie (1904) 6 F 642 (refd)
Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214, FC (folld)
Ratcliffe v Evans [1892] 2 QB 524, CA (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
B *Sandison v Malayan Times Ltd & Ors* [1964] 1 MLJ 332 (distd)
Seaga v Harper [2008] 1 All ER 965, PC (refd)
Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 (refd)

C **Legislation referred to**

Rules of the High Court 1980 O 78 r 3(2)

Appeal from: Civil Suit No 22NCVC-455–04 of 2012 (High Court, Kuala Lumpur)

D

Hanipa Maidin (Mohamed Hanipa & Assoc) for the appellant.
Hasnal Rezua Merican (Ruzaini bin Zulkifli with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the respondent.

E **Abang Iskandar JCA (delivering judgment of the court):**

BRIEF FACTS OF THE CASE

[1] The respondent, Dato' Dr Hasan bin Hj Mohamed Ali ('the plaintiff' F in the court below) is a former Selangor State Assemblyman for Gombak Setia and also a former member of the Selangor State Executive Council ('EXCO') in charge of Islamic Affairs, Malay Customs, Infrastructure and Public Facilities from March 2008 – 8 January 2012. He also used to hold various positions in the government service for 20 years. Apart from that, he had also held various G positions in Parti Islam SeMalaysia ('PAS') before he was dismissed from PAS. After being dismissed from PAS, the plaintiff had formed a non-governmental organisation ('NGO') called Jalur Tiga ('JATI').

[2] Khalid bin Abdul Samad, the defendant in the court below ('the H defendant') was at the material time a Member of Parliament for Shah Alam, Selangor since 2008 until now. The defendant is also a member of PAS and holds various positions in the party.

[3] In this case, the plaintiff had instituted a civil action against the I defendant and claimed for damages for defamation allegedly committed by the defendant in a press conference held on 24 February 2012 at 6C, 3rd Floor, Block 1, Worldwide Business Centre, Jalan Tinju 13/50, Seksyen 13, Shah Alam, which later was published by the defendant in his blog, http://www.khalidsamad.com/2012/02/video-siapa-taja-hasan-ali.html on

27 February 2012. The publication was in the form of a video clip and an article entitled 'Video: Siapa Taja Hasan Ali' ('the article'). It was also contended by the plaintiff that those defamatory statements were published with malice, aforethought. We reproduce below the article which was marked as P1 which had allegedly contained the defamatory statements by the defendant against the plaintiff:

> Video: Siapa Taja Hasan Ali
>
> Timbalan Pesuruhjaya Pas Selangor, Khalid Samad hari ini membangkitkan persoalan sumber kewangan siri 'roadshow' mantan Exco negeri, Datuk Dr Hasan Ali ke seluruh negara yang pastinya menelan biaya yang besar.
>
> Menurut Khalid, sesiapa sahaja yang berada di belakang Dr Hasan Ali semestinya pihak-pihak yang bakal mendapat keuntungan sekiranya Kerajaan Pakatan tumbang di Selangor pada Pilihanraya Umum akan datang.
>
> Di antara yang berkemungkinan ialah Puncak Niaga dan Syabas kerana kadar tarif air akan naik sebanyak 71 peratus sekiranya BN kembali memerintah negeri Selangor.
>
> '37 peratus untuk tahun 2009 dan 25 peratus untuk tahun 2012. Jika didarabkan 1.37 dengan 1.25 maka jawapannya ialah pendapatan Syabas dan Puncak Niaga naik sebanyak 71 peratus,' kata Khalid yang juga Ahli Parlimen Shah Alam.
>
> Selain itu, Khalid juga memberitahu sekiranya Barisan Nasional berjaya menawan Selangor, Syabas berkemungkinan memperoleh kelebihan untuk menjalankan rundingan luar mahkamah berhubung kes saman RM1 billion terhadap Kerajaan Negeri.
>
> 'Kerajaan Negeri sekarang disaman kerana tidak benarkan kenaikan harga air pada 2009 dan 2012, maka Syabas bertindak saman Kerajaan Pakatan sebanyak RM1 billion. Kalau Kerajaan BN naik, mereka pasti akan lakukan 'out of court settlement' dan duit sebanyak itu akan diserahkan pada Syabas dalam apa bentuk sekalipun yang dipersetujui bersama,' tambah Khalid lagi.
>
> Selain Puncak Niaga dan Syabas, Khalid turut memberitahu kemungkinan ada kontraktor-kontraktor berkepentingan lain yang membiayai Dr Hasan Ali.
>
> 'Di bawah Pakatan Rakyat, mereka tidak berpeluang merasai keuntungan seperti dahulu kerana semua peluang adalah 'open tender' dan tiada lagi 'direct negotiation' serta tiada lagi projek diberi sebagai 'political payback'. Oleh kerana itu ada kemungkinan kontraktor-kontraktor yang lain ini membiayai Dr Hasan Ali,' jelas Khalid dalam satu sidang medianya di pejabatnya di Seksyen 13 disini pagi tadi.
>
> Bagaimanapun, Khalid menjelaskan sekiranya perkara ini tidak benar, pihak-pihak yang berkaitan dapat memberi penafian berhubung 'cakap-cakap kedai kopi' ini dan Dr Hasan Ali dapat memberi penjelasan berkenaan sumber yang diperolehinya.
>
> 'Kita mahu beri peluang kepada Puncak Niaga, Syabas, Dr Hasan Ali untuk menjawab segala andaian ini. Mungkin juga Hasan Ali sudah menggadaikan harta mahupun keretanya demi perjuangan politiknya.'
>
> 'Tetapi jika tidak, yang kita mahu tahu ialah dari mana sumber kewangan yang beliau perolehi ini,' ulas Khalid.

[4] Resulting from the defendant's statement, it caused the reporters who attended the press conference to report in various online publications such as mStar, Ar Risalah and Malaysiakini website, the statement made by the defendant during questions and answers session, inter alia the source of fund for the plaintiff to launch JATI which cost about RM30,000 as it was held at Shah Alam Convention Centre ('SACC').

[5] The plaintiff had assigned various meanings as a result of the statements contained in the article P1 as pleaded by him in para 25 of his statement of claim, in particular, as per paras 25.1–25.22 thereunder. That was the reasonable interpretation that could be deduced from the impugned statements attributable to the defendant. The plaintiff found them to be defamatory of his character and reputation.

[6] As a defence, the defendant denied that the article was defamatory in nature. In the event that they were defamatory, it was the defendant's case that it was a statement of fact and/or a fair comment or opinion where it was published on occasion of privilege for public interest as the plaintiff was under public scrutiny after his dismissal from PAS. The defences that were sought to be availed by the defendant had been one of qualified privilege and one of fair comment. It was also submitted by the defendant that the plaintiff had failed to prove that there was malice aforethought on the part of the defendant when the alleged defamatory statements were published.

[7] The learned High Court judge ('the learned trial judge') had allowed the plaintiff's claim on 27 November 2013 and ordered the defendant to pay RM200,000 as general damages, and a further RM100,000 as aggravated damages, with interest and costs. The defendant had since filed this appeal to the Court of Appeal vide notice of appeal dated 23 December 2013.

THE APPEAL

[8] We had heard both parties during oral submissions before us. After perusing the appeal records, we had unanimously agreed to allow the appeal *in part*, whereby we affirmed the finding by the learned trial judge on liability and the award of general damages against the defendant. However, we set aside the aggravated damages awarded by the learned trial judge. We also allowed costs of RM5,000 to the plaintiff and ordered the deposit to be refunded to the defendant. We now proffer our reasons for having so decided.

[9] For consistency, we will refer to the parties as they appeared in the High Court proceedings. There are 17 grounds of appeal laid down in the

memorandum of appeal. However, during the hearing of this appeal, Mr Hanipa Maidin, learned counsel for the appellant/defendant had compressed them into five major issues namely:

(a) whether the statement made is defamatory;

(b) whether the defence of qualified privilege is applicable;

(c) whether it is protected by the defence of 'fair comment';

(d) whether there was malice on the part of the defendant; and

(e) the issue of damages.

OUR FINDINGS

On the issue of liability

[10] On the issue of whether the impugned statements were defamatory, the learned trial judge had dealt with the issue correctly. He had referred to the correct legal principle and applied the same to the evidence before him in a manner which was above reproach.

[11] The law on defamation is rather trite. The onus lies on the plaintiff to establish, on the balance of probabilities, that the impugned statements that the defendant had published had in fact referred to the plaintiff and that it had the tendency of bearing a defamatory meaning. There must be publication of the alleged defamatory statement and it is publication as soon as it is published to a third person (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152). In this case, the issue of publication was not disputed and neither was the fact that the impugned statements in P1 had referred to the plaintiff.

[12] As to the meaning of 'tendency of bearing a defamatory meaning' perhaps a reference to the speech by the learned justice Mohd Azmi J (as he then was) in the case of *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58 would be helpful to illustrate the point:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

[13] Indeed, that test is in consonance with what was stated in *Halsbury's Laws of England* (4th Ed) whereby at p 7 therein it was stated as follows:

> A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be

shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to his office, profession, calling, trade or business.

[14] Reverting back to this case, with respect, we were not able to accede to the contention of learned counsel for the defendant that the sting of the impugned statements had been diluted substantially by the subsequent paragraphs so as to nullify the defamatory effect of the said statements under scrutiny. With respect, we agreed with the submissions of learned counsel for the plaintiff to the contrary. The test for determining whether the statement was defamatory or not has been well-settled as can be seen above.

[15] Looking at the statements made by the defendant against the plaintiff we agreed with the learned trial judge that the plaintiff's reputation had been tarnished and his reputation lowered in the eyes of reasonable members of society. The statements in P1 were clearly in their natural and ordinary meaning defamatory of the plaintiff and the meanings that were assigned to the impugned statements as pleaded in para 25 of the plaintiff's statement of claim were, to our mind reasonable conclusions that would be derived by right thinking members of society. The learned trial judge did not err when he found that defamation had been committed by the defendant against the plaintiff in the form in which P1 was published.

[16] We also agreed with the submissions of learned counsel for the plaintiff that the defendant did not offer any alternative meanings that could reasonably be deduced from the impugned statements by a reasonable member of society. It therefore meant that the defendant had accepted the meanings as assigned to the statements as pleaded by the plaintiff in para 25 of his statement of claim.

[17] We agreed with the learned trial judge that the defendant had defamed the plaintiff when he published the impugned statements during the press conference and then in his blog. We found no merits in the submissions of the defendant.

[18] Having found the statements to be defamatory, the defendant had sought to avail to himself the defences of qualified privilege and/or of fair comment.

[19] In a defence of *qualified privilege*, truth is not a pre-requisite but it can only succeed if there is no malice in such a defamatory publication. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect one's reputation, it is recognised that in particular situations it is to the benefit of society generally for people to be able to communicate without

fear of being sued for defamation. This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its rationale resides in the consideration that a general public good in such exercise overrides the need to protect individual reputation.

[20] On the evidence led in this case, we agreed with the learned trial judge that such defence could not succeed. In order for such a defence to succeed, there must first exist a duty on the defendant to report to the public at large about the perceived misconduct on the part of the plaintiff. It is also a legal requirement that there must not be malice on the part of the defendant when he decided to communicate the defamatory statements against the plaintiff. Lord Carswell put in very clearly in his speech in the case of *Seaga v Harper* [2008] 1 All ER 965 at p 968 like so:

> The defence of qualified privilege ... is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive.

[21] In the context of this appeal before us, the defendant had failed to show to the court that he was a member of JATI and on that score alone, he had no business to be concerned with the affairs of JATI vis a vis the plaintiff, much less in the manner in which the defendant had published the defamatory statements. JATI's affairs were entirely a matter for its members to be concerned with, if at all. Not being a member of JATI, the defendant had no duty to communicate his concerns on the financial contributors of JATI to the public at large by publishing his statements in his blog. In the circumstances, the public at large being the recipients of the statements had no reciprocal duty to receive the same. Clearly, there was no nexus between the defendant and JATI that might have given rise to such a duty to the defendant. As such, we agreed with learned counsel for the plaintiff that the defendant cannot avail himself of the defence of qualified privilege in this defamation suit brought against him.

[22] It is also worth noting that the P1 was published by the defendant in retaliation to the plaintiff's attack against him as 'pengkhianat dan juga pemimpin parasit'. By right, his reply ought to have addressed and rebutted the allegation thrown at him by the plaintiff, if the same were false. However, the defendant did not rebut the allegation of him being a parasitic leader and a traitor. Instead, what he did, as appeared in P1 could be termed, if we may, as a tirade against the plaintiff the meanings of which could only be concluded to be defamatory of the plaintiff. The essence of P1 did not attempt to vindicate

the defendant's reputation or character from the aspersions which the plaintiff had allegedly spewed at him. We agreed with the submissions of learned counsel for the plaintiff that P1 was used as a platform to attack and defame the plaintiff.

[23] As such, the learned trial judge was correct when he ruled against the defendant in that the 'defendan gagal membuktikan wujudnya satu 'privileged occasion' bagi justifikasi pengataan-pengataan yang diterbitkan oleh defendan di dalam 'P1' tersebut'. Even if there was occasion of such privilege, the plaintiff had shown from the circumstances of this case, there was malice on the part of the defendant when he published P1. Such presence of malice had negated the good that might have come along with the publication.

[24] The defendant had also relied on the defence of *fair comment*. The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have held that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.

[25] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence of fair comment will fail. As with justification, the defendant does not to have to prove the truth of *every* fact, provided the comment was fair in relation to those facts which are proved. However, fair in this context, does not mean reasonable, but rather, it signifies the *absence of malice*. The views expressed can be exaggerated, obstinate or prejudiced, provided they are *honestly* held. If the plaintiff/claimant can show that the publication was made *maliciously*, the defence of fair comment will not succeed.

[26] A defendant vying to avail himself of the defence of fair comment has to plead such a defence properly as required by the applicable rules of procedure. But having perused through the pleadings of the defendant in this appeal, we noted that the defendant's pleadings on fair comment itself were flawed. It was not in accordance with O 78 r 3(2) of the Rules of the High Court 1980. The defendant's pleadings showed that the defendant had not stated clearly what the statements of facts were. The said O 78 r 3(2) stipulated that in an action involving slander or libel, which, in our case is the latter, as the defendant relying on the defence of fair comment, he must give particulars stating which of the words complained of were statement of facts. This is so as to enable the plaintiff to sufficiently reply to them, without being unduly prejudiced by the

lack of clarity on the intended defence of fair comment.

[27] On the evidence before this court, in particular with reference to P1, the pleaded defence failed to exhibit which of the words therein were facts and which were comments. Such blatant non-compliance of O 78 r 3(2) of the Rules of the High Court 1980 had rendered the defence of fair comment unsustainable.

[28] We were also in agreement with learned counsel for the plaintiff that the 'comments' made by the defendant were neither fair nor accurate. The essence of a defence of fair comment is that the commentator must ensure that the facts that he is stating must be accurate and factually right. That is the law as stated by the Privy Council in the case of *Joshua Benjamin Jeyaretnam v Goh Chok Tong* [1989] 3 MLJ 1. In this case, as the defendant had failed to particularise which of the words in P1 were his comments, it would be impossible to even venture a guess. The court would not indulge in conjecture and speculation in order to identify for the defendant what the 'comments' would be. As such, the learned trial judge was correct in dismissing the defendant's defence of fair comment. In the circumstances of this case, it was a non-starter.

[29] With regard the issue of malice, we were of the view that malice, not unlike intention, is a state of mind. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct, then the presence of malice can only be deduced or inferred from the circumstances obtaining in each case. In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 Wan Hamzah J (as he then was) had this to say on the subject matter of malice, at p 179 of the report:

> Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred.

[30] The English case of *Lee v Ritchie* (1904) 6 F 642 was cited as authority for such legal proposition. With respect, the position as stated by learned Justice Wan Hamzah J still remains good law until today.

[31] On the issue of malice, we agreed with the finding of the learned trial judge that there was ample evidence led by the plaintiff from which such malice could be readily inferred.

[32] There was another matter that was raised by the defendant pertaining to the plaintiff's pleaded case on malice. It is this. The law was clear. Malice must be pleaded and pleaded by the plaintiff. It was submitted for the defendant that

the plaintiff must so plead in his reply to the defence when the latter denies the same in his defence. A failure on the part of the plaintiff to do just that would be fatal. So the case for the defendant was articulated.

[33] Suffice for the purpose of dealing with that submission, for us to quote learned Justice Lee Hun Hoe CJ (Borneo) in the case of *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214 where His Lordship had occasion to say the following at p 217:

> I should point out the proviso speaks of express malice. Thus, *Mallal's Supreme Court Practice* at p 266 cites *Smith's case* (1917) 142 LT 263 to say where, in order to succeed, it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. *The point is that if plaintiff has already alleged malice in his statement of claim the proviso does not come into play*. Consequently, the last ground must also fail. (Emphasis added.)

[34] Applying the principle as enunciated by the Federal Court in the *Luk Kai Lam v Sim Ai Leng* case since the plaintiff had pleaded in his statement of claim that the defendant had been malicious in defaming him, there was no need for the plaintiff to have to state in his reply to the statement of defence that the defendant had been malicious. Malice had been pleaded, as such there was no further need to plead it again just because the defendant had referred to it in his statement of defence. Redundancy in pleading of material facts does not add further value to what has been pleaded. There was therefore no merit in the contention of the defendant in that regard.

[35] Premised on the above, we found that the learned trial judge did not err when he came to the conclusion that the defendant was liable for defaming the plaintiff in the manner as outlined above. We had been invited by learned counsel for the defendant to reassess the findings of facts made by the learned trial judge. The general principle of law in play pertaining to such issue is trite. Unless it can be shown to an appeal court that there has been gross misfindings of facts committed by the trial judge or findings made were against the weight of evidence as adduced before the trial tribunal, the appeal court will invariably give deference to the trial judge's findings, even though it may have come to a different finding from that of the trial judge. This is because the trial judge has the audio-visual benefit of first-hand observation of the demeanour of the witnesses who had appeared before him. The Federal Court decision in the case of *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1 is highly instructive in that regard. One would observe that *Lee Ah Seng* was a criminal case. However, we are of the view that such observation is of no significance because the role of the appellate tribunal is identical regardless of whether it hears a civil or a criminal appeal. In both instances, it does not, ipso facto, sit as a trier of

primary facts. That function resides with the trial court of first instance. The appeal court will only transcend into the facts if it was apparent on the face of the appeal records that there exist misgivings surrounding the findings of facts made by the trial court. If there is none, the law does not warrant the appeal court to intervene with the findings just because the appeal court entertains a different conclusion to that of the trial judge. In *Lee Ah Seng*'s case, the apex court had said:

> The credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such finding of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding.

[36] In this instant appeal, we had found nothing in the evidence that would justify us in overturning the material facts as found by the learned trial judge in coming to his findings of facts before coming to his conclusion on liability. As such, we must therefore decline the invitation by learned counsel for the defendant to depart from the findings made by the learned trial judge. His findings on the defamatory nature of the impugned statements published by the defendant, the failure of the defendant to establish the avowed defences of qualified privilege and fair comment and that there was malice on the part of the defendant when he published those impugned statement in the article marked as P1 were supported by cogent evidence coupled with sound application of the relevant legal principles. We could not in all fairness to the learned trial judge say that he had been plainly wrong, such that our curial intervention had become warranted (see the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). We therefore affirmed his conclusion on *liability* in toto.

On the issue of damages

[37] The records of appeal have shown that the learned trial judge had awarded two heads of damages against the defendant having found him liable for defamation. For general damages, he had awarded a sum of RM200,000 which the defendant had to pay to the plaintiff. Under the head of aggravated damages, he had awarded against the defendant a sum of RM100,000 to be paid to the plaintiff. Before us, it was submitted by learned counsel for the defendant that if any damages were due to the plaintiff it would have to be merely nominal damages. The case of *Sandison v Malayan Times Ltd & Ors* [1964] 1 MLJ 332 was cited in support where the court in that case had awarded one cent to the plaintiff as damages.

[38] Having heard submissions by both learned counsel, we were of the view that damages ought to flow once liability for defamation was established. Lord Justice Bowen was clear as to the law as could be seen in his decision in the case

of *Ratcliffe v Evans* [1892] 2 QB 524 where he had said at p 528: 'the Law presumes that some damages will flow in the ordinary course of things from the mere invasion of the plaintiffs' right ...'. It therefore remained only the issue of quantum that needed to be addressed. In the circumstances, we affirmed the award entered against the defendant for general damages. Suffice to state here that the peculiar circumstances listed in the decision in the case of *Sandison v Malayan Times Ltd & Ors* were not entirely identical with that which obtained in this appeal before us. There was no evidence led by the defendant to show that the plaintiff had only a 'little residue of credit' although he was sacked by PAS. However, we had allowed the defendant's appeal against the award for aggravated damages as the plaintiff had failed to prove circumstances that would justify an award of such damages against the defendant. In the result thereof, we had set aside the said award for aggravated damages of the learned trial judge.

[39] In the final analysis, we therefore allowed the appeal *in part*. We had so ordered accordingly.

Appeal allowed in part.

Reported by Dzulqarnain Ab Fatar